CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 631.

CHARLES PONZI

vs.

FRANKLIN G. FESSENDEN ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED DECEMBER 2, 1921.

(28,586)

(28,586)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1921.

Original.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1921.

No. 1525.

CHARLES PONZI,
PETITIONER, APPELLANT,
v.
FRANKLIN G. FESSENDEN ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

NOVEMBER 29, 1921.

The facts in this case are as follows: —

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court for Suffolk County in the Commonwealth of Massachusetts charging him with certain larcenies, with being an accessory before the fact to certain larcenies and with conspiracy to commit larceny.

October 1, 1920, two indictments charging violation of Section 215 of the Penal Code were returned against said Ponzi in the District Court of the United States for the District of Massachu-

setts. November 30, 1920, he was arraigned and pleaded guilty to the first count of one of these indictments and was sentenced by said court to imprisonment for five years in the House of Correction at Plymouth, in the County of Plymouth and the Commonwealth of Massachusetts.

April 21, 1921, the Superior Court for Suffolk County issued a writ of habeas corpus directing the master of the House of Correction, who, as Federal agent, had custody of Ponzi by virtue of the mittimus issued by the United States District Court, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the twenty-two indictments pending before it but to hold Ponzi at all times in his custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake, the master of the House of Correction, made a return to said writ to the effect that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

After service of this writ upon Blake the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the Superior Court and that the Attorney General directed Blake to comply with the writ.

Upon Blake's refusal to produce Ponzi the Superior Court adjudged him in contempt and committed him to the custody of a sheriff. Blake thereupon filed in the United States District Court a petition for a writ of habeas corpus directed against the sheriff, which was dismissed April 27, 1921. From this order of dismissal no appeal was taken by Blake. Thereafter Blake produced Ponzi in the Superior Court pursuant to the writ of habeas corpus issued by said court.

May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus directed against the justice of the Superior Court who issued the writ in the State proceedings, and against Blake, the master of the House of Correction, alleging in

substance that he was within the exclusive jurisdiction of the United States, and that the State court had no jurisdiction on habeas corpus proceedings directed against said Blake, holding him as a Federal agent, to try him for said alleged crimes. If material, it further appears in the record that Ponzi, having been produced under said State process before the State court, was arraigned and stood mute, and a plea of not guilty having been entered at the direction of the court, thereupon requested to be admitted to bail, the offence for which he was indicted being bailable; and that said request was denied. Ponzi's petition for writ of habeas corpus was denied by said District Court on May 24, 1921; and an appeal was taken to this court.

We desire the instruction of the Supreme Court upon the following question: —

May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

It is now, to wit, November 29, 1921, ordered, that the foregoing statement of facts, and question of law arising thereon, be certified under the seal of this court and transmitted to the Supreme Court.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Certificate of Certification.

And now, here, the Judges of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of an Order of Court entered on November 29, 1921, in said cause numbered and entitled, No. 1525, Charles Ponzi, Petitioner for Habeas Corpus, Appellant, vs. Franklin G. Fessenden et al., Defendants, Appellees, and that pursuant to said order, the statement of facts and question of law arising thereon, together with the fact that said Circuit Court of Appeals desires the instruction of the Supreme Court of the United States for the proper decision of said question of law, contained in said order, are hereby certified under the seal of said United States Circuit Court of Appeals for transmission to said Supreme Court.

In testimony whereof I hereto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in the First Judicial Circuit, this twenty-ninth day of November, A. D. 1921.

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

Endorsed on cover: File No. 28,586. U. S. Circuit Court Appeals, 1st Circuit. Term No. 631. Charles Ponzi vs. Franklin G. Fessenden et al. (Certificate.) Filed December 2d, 1921. File No. 28,586.

Supreme Court of the United States

OCTOBER TERM, 1921.

CHARLES PONZI,
PETITIONER, APPELLANT,

v.

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DEFENDANTS, APPELLEES.

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QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

NOVEMBER 29, 1921.

MOTION TO ADVANCE.

And now comes the Commonwealth of Massachusetts and moves that the question certified by the Circuit Court of Appeals for the First Circuit (a copy whereof is hereunto annexed and marked "A") be advanced for speedy hearing.

REASONS FOR THE MOTION.

On September 11, 1920, twenty-two indictments were returned against Charles Ponzi, who was then in Federal custody, charging him with conspiracy to commit larceny, with being an accessory before the fact to certain larcenies, and with certain larcenies. In the indictment for conspiracy six other persons are joined, to wit: Louis R. Cassullo, John S. Dondero, John A. Dondero, Harry Mahoney, Rinaldo Bosselli and Henry T. Nielsen. Of these all except Cassullo have been arrested and are awaiting trial. The date of the alleged conspiracy is laid as April 1, 1920. The alleged larcenies with which said Ponzi is charged either as principal or as an accessory before the fact are alleged to have been committed in April, May, June and July, 1920. Many of the witnesses are persons who do not long remain in one place. A considerable number are aliens who may at any time leave the Commonwealth and the United States. In order that evidence might not be lost by delay the Commonwealth prepared these cases for trial and on April 21, 1921, procured from the Superior Court of Suffolk County a writ directing Earl P. Blake, the Master of the House of Correction at Plymouth, to produce before the said court the said Ponzi for trial forthwith, he to remain at all times in the custody of said Blake as an officer of the United States. Thereafter the proceedings more fully described in the statement of facts accompanying the question certified were had, and Ponzi was produced by said Blake pursuant to said writ. While a jury was being empanelled to try said Ponzi and the other defendants, but before the jury was completed,

said Ponzi sued out the present writ of habeas corpus. The respondent, Judge Fessenden, being of opinion that all the defendants should be tried together, thereupon stayed proceedings not only as to said Ponzi but also as to his co-defendants, to await the conclusion of the present habeas corpus proceeding brought by said Ponzi.

The reasons for advancing this case for speedy hearing may therefore be summarized as follows:

1. Five co-defendants await trial with said Ponzi.

2. The alleged crimes were committed over a year and a half ago.

3. The present indictments have been pending for over a year.

4. The indictments against said Ponzi having been returned at a time when said Ponzi was in Federal custody, the proceedings against him were held in abeyance until the conclusion of the Federal proceedings against him and were thereafter pressed as soon as circumstances would permit.

5. Trial has already been delayed by the present proceedings for over six months.

6. Important, and indeed essential witnesses may die or disappear if the case be left to await its ordinary turn upon the docket.

J. WESTON ALLEN,
Attorney-General.

The above-named Charles Ponzi acknowledges service of a copy of the above motion to be presented on January 3, 1922.

Daniel H. Coakley
by H. Minot Stud
Attorney for Petitioner.

A.

United States Circuit Court of Appeals

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1921.

No. 1525.

CHARLES PONZI,
PETITIONER, APPELLANT,

v.

FRANKLIN G. FESSENDEN ET AL.,
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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NOVEMBER 29, 1921.

The facts in this case are as follows: —

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court for Suffolk County in the Commonwealth of Massa-

chusetts charging him with certain larcenies, with being an accessory before the fact to certain larcenies and with conspiracy to commit larceny.

October 1, 1920, two indictments charging violation of Section 215 of the Penal Code were returned against said Ponzi in the District Court of the United States for the District of Massachusetts. November 30, 1920, he was arraigned and pleaded guilty to the first count of one of these indictments and was sentenced by said court to imprisonment for five years in the House of Correction at Plymouth, in the County of Plymouth and the Commonwealth of Massachusetts.

April 21, 1921, the Superior Court for Suffolk County issued a writ of habeas corpus directing the master of the House of Correction, who, as Federal agent, had custody of Ponzi by virtue of the mittimus issued by the United States District Court, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the twenty-two indictments pending before it but to hold Ponzi at all times in his custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake, the master of the House of Correction, made a return to said writ to the effect that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

After service of this writ upon Blake the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the Superior Court and that the Attorney General directed Blake to comply with the writ.

Upon Blake's refusal to produce Ponzi the Superior Court adjudged him in contempt and committed him to the custody of a sheriff. Blake thereupon filed in the United States District Court a petition for a writ of habeas corpus directed against the sheriff, which was dismissed April 27, 1921. From this order of dismissal no appeal was taken by Blake. Thereafter Blake produced Ponzi in the Superior Court pursuant to the writ of habeas corpus issued by said court.

May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus directed against the justice of the Superior Court who issued the writ in the State proceedings, and against Blake, the master of the House of Correction, alleging in substance that he was within the exclusive jurisdiction of the United States, and that the State court had no jurisdiction on habeas corpus proceedings directed against said Blake, holding him as a Federal agent, to try him for said alleged crimes. If material, it further appears in the record that Ponzi, having been produced under said State process before the State court, was arraigned and stood mute, and a plea of not guilty having been entered at the direction of the court, thereupon requested to be admitted to bail, the offence for which he was indicted being bailable; and that said request was denied. Ponzi's petition for writ of habeas corpus was denied by said District Court on May 24, 1921; and an appeal was taken to this court.

We desire the instruction of the Supreme Court upon the following question: —

May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on

a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

It is now, to wit, November 29, 1921, ordered, that the foregoing statement of facts, and question of law arising thereon, be certified under the seal of this court and transmitted to the Supreme Court.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Boston, December 24,1921

United States of America,
Massachusetts District, ss

Pursuant hereunto I have this day served the within Motion to Advance on Daniel H. Coakley, Attorney of Record for C harles Ponzi, by giving in hand to W.Minot Hurd, Attorney associated with Daniel H. Coakley, at Pemberton Building, Boston in said District, a true copy of the within Motion to Advance, said Attorney accepting service, by placing his endorsement on this Motion.

William J. Keville,
United States Marshal

By Joseph J. Quinn
Deputy

Supreme Court of the United States.

October Term, 1921.

No. 631.

CHARLES PONZI

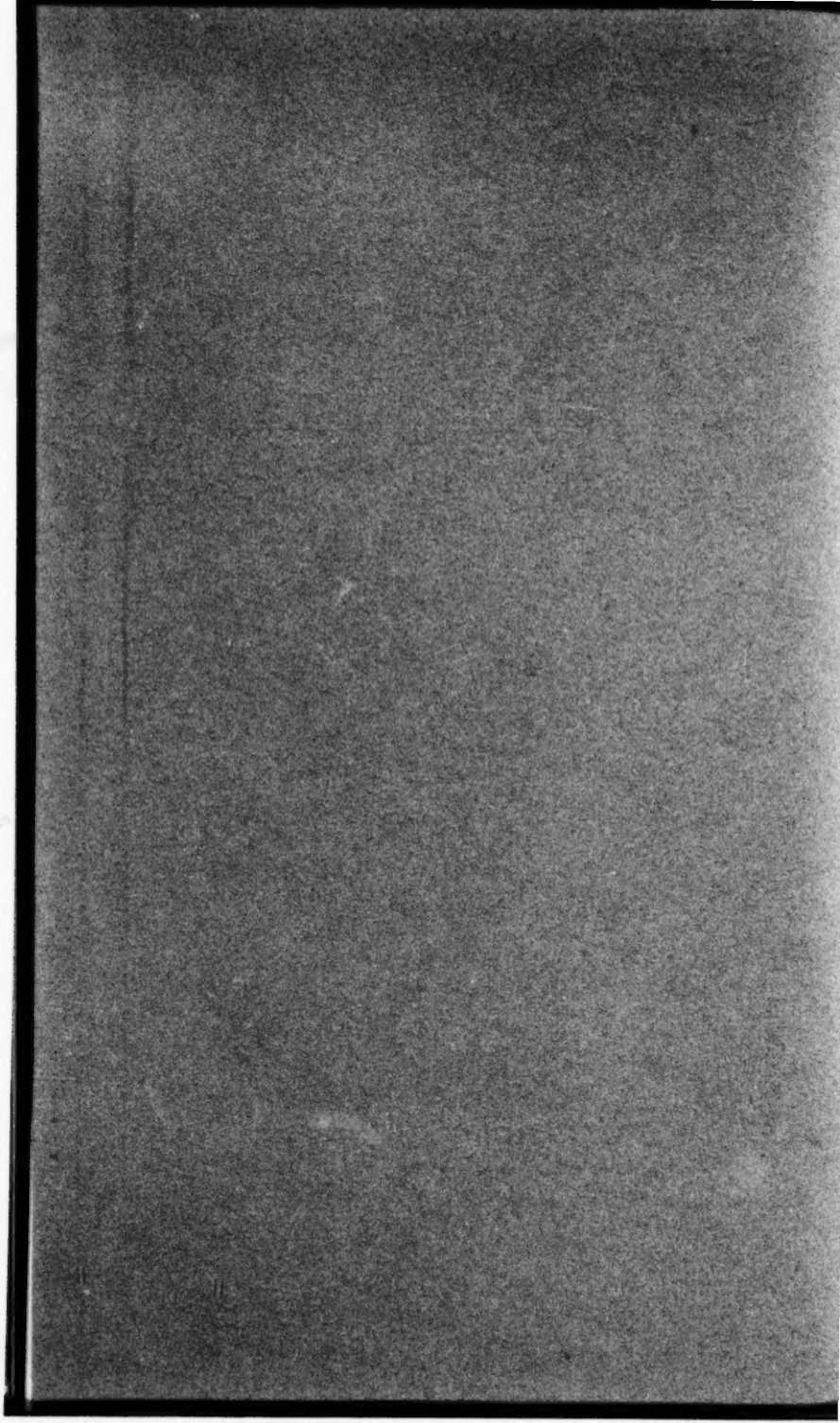
v.

FRANKLIN G. FESSENDEN ET AL.

Brief for Charles Ponzi.

WILLIAM H. LEWIS,
Attorney for Charles Ponzi.

ANDREW C. SPENCELEY & SON, LAW PRINTERS, BOSTON.



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CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 631.

CHARLES PONZI

v.

FRANKLIN G. FESSENDEN ET AL.

BRIEF FOR CHARLES PONZI.

This case comes before this court upon a "certificate" of the United States Circuit Court of Appeals for the First Circuit under section 239 of the Judicial Code, in which the Court of Appeals "desires" the instruction of the Supreme Court upon the following question:

"May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?"

STATEMENT OF THE CASE.

Charles Ponzi is a prisoner of the United States, now serving a sentence of five years in the House of

Correction at Plymouth, in the County of Plymouth and Commonwealth of Massachusetts, imposed by the United States District Court for the District of Massachusetts, November 30, 1920, upon a plea of guilty to an indictment charging him with violation of section 215 of the Penal Code—use of the mails in pursuance of a scheme to defraud, or to obtain money or property by false pretenses, etc. A second indictment is still pending against him. September 11, 1920, twenty-two indictments were returned against him in the Superior Court of Massachusetts, sitting at Boston, for the County of Suffolk, charging him with larceny, accessory to certain larcenies, and conspiracy to steal. April 21, 1921, the respondent Fessenden, as he is a Judge of the Superior Court for the Commonwealth of Massachusetts, sitting at Boston, in the County of Suffolk, issued a writ of habeas corpus directed to the other respondent, Blake, as he is Master of the House of Correction at Plymouth, the federal agent having in custody said Ponzi, to bring Ponzi before the said Superior Court forthwith for trial upon said twenty-two indictments then and there pending against him. After the service of this writ upon Blake, an Assistant Attorney General of the United States, by direction of the Attorney General, stated in open court that the United States had no objection to the issuance of the writ, and directed Blake to comply with the same. Blake refused to produce Ponzi, was adjudged in contempt, and was committed to the custody of the Sheriff of Suffolk County. Thereupon Blake filed a petition for the writ of habeas corpus in the United States District Court, directed against the Sheriff, which was heard and dismissed on April 27, 1921.

Thereupon Blake produced Ponzi before the Superior Court for trial. May 23, 1921, Ponzi filed in the District Court of the United States for the District of Massachusetts a petition for the writ of habeas corpus directed against the respondents Fessenden and Blake. His petition was dismissed, an appeal was taken to the Circuit Court of Appeals for the First Circuit, and thereupon all proceedings in the state court were stayed in accordance with R.S. 766.

ARGUMENT, POINTS, AND AUTHORITIES.

The contention of the petitioner Ponzi is that the question certified by the Court of Appeals should be answered in the negative for the following reasons:

I.

IF THE PETITIONER COULD NOT BE TRIED IN THE STATE COURT, PENDING HIS SENTENCE, WITHOUT THE CONSENT OF THE ATTORNEY GENERAL OF THE UNITED STATES, HE COULD NOT BE TRIED AT ALL.

The assent of the Attorney General adds nothing to the legality of such a proceeding. It may be inferred from the statement of facts on page 2 of the certificate, and the form of the question itself on page 3, that it was conceded by the respondent Fessenden that he could not try Ponzi without the consent of the United States. The decision of Morton, J., upon Blake's petition turned upon the assent of the Attorney General to the writ of the state court. The Attorney General of the United States is a statutory officer, and has no power or authority over prisoners of the United States, except such as is expressly given

him by some statute of the United States, or as may be necessarily implied from some express statute.

It is submitted that the Attorney General has no such custody or control over a prisoner of the United States while serving a sentence in a state jail or penitentiary as will give him the power to direct a federal agent to hand such a prisoner over to a state court for trial.

The Attorney General has power to make contracts for the subsistence and employment of prisoners of the United States serving sentence in state jails or penitentiaries. R.S. sec. 5547.

Prisoners of the United States confined in a state jail or penitentiary cannot receive a deduction from their term of sentence, or discharge, without the approval of the Attorney General. R.S. 5543.

No prisoner may be paroled from a state jail or penitentiary without the approval of the Attorney General. Sec. 10,543 of the Comp. Sts., Act of June 25, 1910, c. 387, sec 9; 36 Sts. at L. 821.

The Attorney General may designate a place of imprisonment where there is no suitable one in the state or district where the prisoner is sentenced, and may change the place of imprisonment for certain reasons with the consent of the prisoner. R.S. 5546 as amended. Sec. 10,547 of the Comp. Sts.

The Attorney General has no control over a prisoner in a state jail or penitentiary. R.S. 5539 is decisive of that question.

> "Whenever any criminal, convicted of any offence against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the

same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."

In *Beavers* v. *Henkel*, 194 U.S. at page 83, this court said:

> "We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. . . . In other words, the removal [under 1014 R.S.] is made a *judicial* rather than a mere ministerial act."

Again, in *Logan* v. *United States*, 144 U.S. 295, this court said:

> "The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty, and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense. . . . Persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any state."

It would seem that, from these emphatic and un-

qualified expressions of this court, a prisoner of the United States is not wholly without some protection.

II.

THE ATTORNEY GENERAL HAS NEITHER EXPRESS NOR IMPLIED AUTHORITY TO INTERVENE IN A HABEAS CORPUS CASE OF THIS CHARACTER.

It is significant that, even in cases involving questions of international law, when a writ of habeas corpus is issued in behalf of a prisoner, who is a subject or citizen of a foreign state, and is in custody under the authority of any one of the United States, for an act done for which he claims protection or exemption under the sanction of a foreign state, notice of the proceedings should be served upon the Attorney General of the state, and not upon the Attorney General of the United States. R.S. 762.

III.

IF THE SITUATION WERE REVERSED, AND PONZI HAD BEEN FIRST TRIED IN THE STATE COURT AND SENTENCED TO SERVE A TERM IN A STATE JAIL OR PRISON, AND THE UNITED STATES DESIRED TO TRY HIM UPON INDICTMENTS PENDING AGAINST HIM IN THE UNITED STATES DISTRICT COURT, NEITHER THE COURT, NOR ANY JUDGE THEREOF, COULD ISSUE A WRIT OF HABEAS CORPUS TO BRING HIM INTO THAT COURT FOR TRIAL.

R.S. 753 provides in substance:

> "That a writ of habeas corpus issued by a federal judge or court, shall in no case extend to a prisoner in jail, unless where he is in custody

under or by color of the authority of the United States;—unless it is necessary to bring the prisoner into Court to testify."

In other words, a prisoner serving sentence, pursuant to a judgment of a state court, in a state jail or prison, cannot be brought into a United States court to respond to an indictment found against him, or for any other purpose except to testify.

Ex parte Burrus, 136 U.S. 586.
Re Dorr, 3 How. 103.
Ex parte Bollman, 4 Cranch, 75.

This court said in the Dorr case:

"The power given to the courts, in this section, to issue writs of scire facias, habeas corpus, etc., as regards the writ of habeas corpus, is restricted by the proviso to cases where a prisoner is 'in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction; and that they qualify and restrict the preceding provisions of the section is undisputable. Neither this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used

> as a witness; and it is immaterial whether the imprisonment be under civil or criminal process."

It would seem, therefore, that the United States ought not to permit a state court to try a prisoner of the United States where, under the same circumstances, a United States court could not try a state prisoner. There is no comity in it.

In all the judicial history of the Commonwealth, from *Sims's Case* (1851) down to the present, Massachusetts has never attempted to assert the right which is now being asserted in this case.

IV.

THE PROCEEDING OF THE STATE COURT, BRINGING PONZI BEFORE IT FOR TRIAL BY A WRIT OF HABEAS CORPUS, IS PRACTICALLY FORBIDDEN BY THE LAWS OF THE COMMONWEALTH UPON THE SUBJECT OF HABEAS CORPUS.

Chapter 248 of the General Laws of Massachusetts, sec. 34, dealing with the subject of habeas corpus, provides:

> "This chapter shall not authorize the taking of a person by writ of habeas corpus out of the custody of the United States marshal, or his deputy, who holds him by a legal and sufficient process issued by any court or magistrate of competent jurisdiction."

The attempt of the state court to try Ponzi, under the circumstances, is clearly an evasion of the state statute, through the device of having him technically remain in the custody of a federal agent, the Master of the House of Correction. The state statute was

enacted for the same purpose as the United States statute upon the subject, for the purpose of preventing a conflict of jurisdiction between the United States and the state courts. It is a mere fiction to say that Ponzi is not in the custody of the court when set to trial. The state court has taken custody of Blake, the Keeper, a federal agent, and therefore must necessarily have custody of Ponzi, his prisoner.

V.

THE WRIT BY WHICH PONZI IS BROUGHT BEFORE THE STATE COURT FOR TRIAL IS IN EFFECT AN ABUSE OF THE WRIT OF HABEAS CORPUS.

What species of habeas corpus is invoked by the state court to bring Ponzi before it for trial? Different classes of habeas corpus writs are set forth in Blackstone's Commentaries, vol. 3, star page 129. This classification was adopted by this court in *Ex parte Bollman*, 4 Cranch, at 98. Without going into the different species, it may be claimed that this is a habeas corpus *ad prosequendum, testificandum, deliberandum*, etc., "which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed." This writ was used in the English law to bring in prisoners from one court to another in the same jurisdiction. That was the use of the writ in the Bollman case. In that case Bollman and Swartwout were committed by the Circuit Court of the District of Columbia on a charge of treason against the United States, which case came before the Supreme Court upon a petition for the writ of habeas corpus and certiorari. The motion was al-

lowed. The court said, with reference to the writ *ad prosequendum*, etc., that "the power to bring a prisoner up that he may be tried in the proper jurisdiction is understood to be the very question now before the court." It is used here as a substitute for removal, or an extradition proceeding. Obviously this writ could not be used to take a prisoner from one state to another, from one jurisdiction to another jurisdiction. If Ponzi had been confined in Atlanta, or in a state prison in Rhode Island, the writ issued out of the state court of Massachusetts could not reach him to bring him before that court. The jurisdiction of the United States, where Ponzi is, is just as foreign to Massachusetts as Rhode Island is to Georgia, and the writ of that court is powerless to reach across the line between the two jurisdictions, that of the State of Massachusetts and the United States, as if the United States were a foreign country.

VI.

THE MITTIMUS ITSELF FORBIDS INTERFERENCE WITH THE BODY OF PONZI BY THE STATE COURT.

The mittimus is in the usual form: In the name of the President of the United States it commands the Marshal, or his deputies, to deliver into the custody of the Master of the House of Correction the body of Charles Ponzi (reciting that he had been sentenced by the court to be imprisoned in the House of Correction at Plymouth, in the County of Plymouth, for a term of five years from November 30, 1920); and then, in the name of the President of the United States, it commands the Master of the House of Correction to re-

ceive said Charles Ponzi into his custody in his said House of Correction, "and him there safely to keep until this sentence is performed or he is otherwise discharged in due course of law."

It is fundamental that, after the term of the court has expired at which sentence was rendered, the court itself cannot interfere with its own mittimus.

In re Jennings, 118 Fed. 479.
Com. v. *Foster*, 122 Mass. 317.
Goddard v. *Ordway*, 101 U.S. 752.
Basset v. *United States*, 9 Wall. 38.
Ex parte Lange, 18 Wall. 167.

In the Jennings case the court said:

> "The law contemplates that after a prisoner has been tried and sentenced, he will be committed at once to the custody of the prison officials where the sentence is to be executed. He passes by virtue of the sentence into a custody different from that of the court before which he was convicted. This doctrine is enforced so rigidly in some jurisdictions, and possibly in all, that, after a sentence for a crime has been pronounced, the prisoner cannot be arraigned and tried for another offense, even in the same court by which he was sentenced, until the sentence is reversed by a higher tribunal, or he has served out his term of imprisonment."

If the mittimus may be interfered with, or modified to the extent of taking Ponzi into the state court and keeping him there long enough to try him upon twenty-two indictments, what is the limit to which further modification may be made in his sentence?

VII.

IN ALL CASES OF CONCURRENT JURISDICTION OR OTHERWISE, THE COURT THAT FIRST ACQUIRES JURISDICTION HOLDS IT TO THE EXCLUSION OF ALL OTHERS, UNTIL ITS JUDGMENT IS SATISFIED.

McCauley v. *McCauley*, 202 Fed. 280, 284.
State v. *Chinault*, 55 Kan. 326.
Ex parte Earley, 3 Ohio Dec. 105.
Com. v. *Fuller*, 8 Met. 318.
Hill Mfg. Co. v. *Prov. & N.Y. Steamship Co.*, 113 Mass. 495.
Ayer v. *Fowler*, 196 Mass. 350.
Wayman v. *Southard*, 10 Wheat. 1.
Covell v. *Heyman*, 111 U.S. 176.
Taylor v. *Taintor*, 83 U.S. 366.
Felts v. *Murphy*, 201 U.S. 123.
Harkrader v. *Wadley*, 172 U.S. 163.
In re Johnson, 167 U.S. 120.
Opinion of the Justices, 201 Mass. 608.

In *Harkrader* v. *Wadley*, this court said:

> "When a state court and a court of the United States may each take jurisdiction of the matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed, and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

This court also said, in *Taylor* v. *Taintor:*

> "Where a state court and a court of the United States may each take jurisdiction, the tribunal

> which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan* v. *Lucas,* 10 Pet. 400; *Taylor* v. *Carryl,* 20 How. 584, 15 L. ed. 1028; *Troutman's Case,* 4 Zabr. 634; *Ex parte Jenkins,* 2 Am. Law Reg. 144. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

In *Wayman* v. *Southard,* Marshall, C.J., said:

> "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."

The principle in *Taylor* v. *Taintor, ante,* was adopted by the Massachusetts Supreme Court in the *Opinion of the Justices,* 201 Mass. 608. In that case a prisoner was confined in state's prison at Charlestown, Massachusetts, serving a sentence for burglary. The Governor of New York made a requisition upon the Governor of Massachusetts, alleging that the prisoner was a fugitive from justice of the State of New York charged with the crime of murder in the first degree. The question propounded by the Governor and Council to the Justices was as follows:

> "May a person convicted of a crime in this Commonwealth and duly committed to and confined in the state prison or other penal institution, be taken therefrom under and by authority of a

warrant issued by the Governor for the extradition of such person, upon lawful demand by the Executive of another State and in accordance with the Constitution and the laws of the United States?"

The Supreme Court of Massachusetts answered the question unanimously in the negative. The court said that section 2 of article 4 (the rendition clause) of the Federal Constitution, had no application to an offender at the time held to answer to an offense against the laws of the state in which he has taken refuge.

> "The demands of justice in that state are as high as in the state from which he came. So long as he is held to answer to the demands of justice in the state where he is found, the demand of the executive authority of the other state should be subordinate to the operation of the laws of his place of refuge. Not only does this follow from the principles on which the constitutional provision rests, but it is stated in decisions of different courts" (citing *Taylor* v. *Taintor*).

Speaking of the power of the Governor:

> "He has no statutory authority to interfere with the execution of the sentence in a criminal case, otherwise than by pardoning the offender. . . . It is within the province of the judicial department to try persons who are charged with crime and to impose punishment upon them if they are found guilty. Except by a pardon of the convict, neither of the other departments can nullify or set aside a sentence of the judicial department

> which is in process of execution under proper warrant from the court. . . . His power, under this provision of the Constitution, is subordinate to the power of his own State, through its proper officers, to hold its prisoners, convicted of crime, until their expiation under its laws has become complete."

If the contention of the respondent is sound, that the rule of comity should govern, why should not the prisoner be taken to New York, tried and convicted of murder in the first degree, and sentenced to be electrocuted to take effect at the expiration of his term of imprisonment in the Massachusetts State penitentiary?

The Johnson case was a petition for the writ of habeas corpus to obtain the release of Charles Johnson from the custody of the Marshal for the Southern District of the Indian Territory, who held him under sentence of death for the crime of rape. The crime was committed in the Indian Territory on the 24th day of July, 1896. The District Court of the United States for the Eastern District of Texas had jurisdiction of the offense. On the 25th day of July a warrant was issued by the United States Commissioner for the Eastern District of Texas against the defendant, charging him with the commission of the crime, but was not served. By Act of March 1, 1895, an additional court was created in the Indian Territory, to be established on the 1st of September, 1896, and provided that in all criminal cases where the courts outside of the Indian Territory had acquired jurisdiction prior to September 1, 1896, they should retain jurisdiction and finally dispose of such cases. On the 17th day of

October, 1896, the defendant was tried, convicted, and sentenced to death by the United States court for the Indian Territory. The petitioner claimed that the United States court for the Indian Territory had no jurisdiction over him, the crime having been committed before September 1, 1896, and claimed that the United States District Court of Texas alone had jurisdiction. His petition for the writ of habeas corpus to be discharged from the custody of the Marshal of the United States court for the Indian Territory was denied. In the course of the opinion, Mr. Justice Brown said:

> "We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between Federal and State courts should not determine this question. Ever since the case of *Ableman* v. *Booth*, 62 U.S., 21 How. 506, it has been the settled doctrine of this court, that a court having possession of a person or property, cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession."

Could any language be stronger and more conclusive than this? Does not the principle laid down there apply to the case at bar with telling force and effect? The jurisdiction of the United States District Court for the District of Massachusetts is not exhausted until the sentence is performed in accordance with its mittimus, or the prisoner is discharged by operation of law—parole or pardon. Moreover, an indictment is still pending against Ponzi in the United States District Court for the District of Massachusetts.

VIII.

CAN THE STATE COURT TRY PONZI WITHOUT JURISDICTION OVER HIS PERSON; IN OTHER WORDS, WITHOUT CUSTODY OF THE PRISONER?

Cyc. vol. 12, pp. 196, 220.
16 Corpus Juris, 174.
12 Ency. Pl. & Pr. p. 179.
Bissell v. *Briggs*, 9 Mass. 467.
Hopkins v. *Com.*, 5 Met. 462.
McCarthy v. *State*, 16 Ind. 311.
Logan v. *Liggarson*, 12 Blackf. (Ind.) 267.
People v. *Hayes*, 136 N.Y. Sup. 857.
Ex parte Bigelow, 113 U.S. 328.
Felts v. *Murphy*, 201 U.S. at p. 123.
In re Johnson, 167 U.S. 120.
Eckhart, Petn'r, 166 U.S. 484.
Carter v. *McClaughry*, 183 U.S. 388.
Valentina v. *Mercer*, 201 U.S. 131.

This court said, in *Ex parte Bigelow:*

> "But that Court had jurisdiction of the offence described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him."

The same language is quoted with approval in *Eckhart, Petn'r;* and also in *Valentina* v. *Mercer.*

In *In re Johnson* this court said (167 U.S. 125):

> "In this connection, jurisdiction of the 'case', i. e. the crime is indistinguishable from jurisdiction of the person who is charged with the crime."

It is admitted that the Superior Court of Massachusetts, being without the custody of the prisoner, would have no present power or authority to enforce any order or judgment against him. If the prisoner should be in contempt of court, the court would have no power to commit him. If the prisoner should commit a crime in the presence of the court, the court would have no authority to punish him.

The certificate shows that, under the habeas issued out of the state court, Ponzi was at all times to remain in the custody of the Master of the House of Correction, the other respondent, Blake, as an officer of the United States.

IX.

CHARLES PONZI, AS A PRISONER OF THE UNITED STATES, IS "WITHIN THE DOMINION AND EXCLUSIVE JURISDICTION OF THE UNITED STATES"—"THE PRISONER IS WITHIN THE DOMINION AND JURISDICTION OF ANOTHER GOVERNMENT, AND NEITHER THE WRIT OF HABEAS CORPUS, NOR ANY OTHER PROCESS ISSUED UNDER STATE AUTHORITY, CAN PASS OVER THE LINE OF DIVISION BETWEEN THE TWO SOVEREIGNTIES."

Ableman v. *Booth*, 21 How. 506.
Robb v. *Connolly*, 111 U.S. 624.
In re Johnson, 167 U.S. 120.
Logan v. *United States*, 144 U.S. 263.
Willoughby on the Constitution of the United States, c. 9, sec. 72.

Bailey on Habeas Corpus, p. 68.

Opinions of Attorneys General, vol. 6, *Collier's Case*, opinion by Caleb Cushing, p. 103.

Opinions of Attorneys General, vol. 12, opinion by Henry Stanbury, *Gormley's Case*, p. 258.

The language of this proposition is taken from *Ableman* v. *Booth*, 21 How. 506. This is a case where one Booth was charged before the United States Commissioner for the District of Wisconsin with having aided and abetted the escape of a fugitive slave. Upon examination before the Commissioner, probable cause was found to hold Booth for the Grand Jury. Booth was surrendered by his bail, and the Commissioner committed him to the custody of the Marshal to be delivered to the Keeper of the jail "until he should be discharged by due course of law." Booth brought a petition for the writ of habeas corpus before a Single Justice of the Supreme Court of Wisconsin against Ableman, Marshal of the United States, alleging that his imprisonment was illegal. The case finally came before this court. The opinion was rendered by Chief Justice Taney:

> "We do not question the authority of a state court, or judge, who is authorized by the laws of the state to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has

a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the Marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the state judge or court, judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other proceeding issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the Marshal, or other person holding him, to make known, by a proper return, the au-

thority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon the habeas corpus issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the Marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

The doctrine laid down in *Ableman* v. *Booth* has never been questioned. This case was decided in 1859. The same result was arrived at by Caleb Cushing, the Attorney General of the United States, in 1851, *Collier's Case*, vol. 6, p. 103. Attorney General Caleb Cushing said, among other things:

> "*A fortiori,* if the indictment be found in a competent court of the United States, the prisoner cannot be withdrawn from its jurisdiction by habeas corpus returnable before a court of one of the States."

Upon principle it seems to us that the doctrine in the Booth case should apply, for the reason that Ponzi is in another jurisdiction. The sovereignties of the State of Massachusetts and the United States are separate and distinct, as if they were foreign states. A prisoner cannot be extradited from one state to another without his consent unless certain procedure is gone through. A prisoner cannot be removed from one federal jurisdiction to another unless certain forms of law are complied with; that is to say, without his consent. It will not be denied that, if Ponzi were in the United States prison at Fort Leavenworth, or at Atlanta, the writ of the state court would not reach him, and he could not be placed upon trial until he had served his term or been discharged by operation of law. Why should there be any difference upon principle in the power of the state court to try him, simply because he happens to be serving his sentence in the State of Massachusetts? Being in the custody of the United States, in the House of Correction at Plymouth, he is just as much in a foreign jurisdiction, foreign to the State of Massachusetts, as if he were in Atlanta, Georgia.

It may be contended that the doctrine in *Ableman* v. *Booth* applies only to the high prerogative writ, in which it is sought to discharge a prisoner held by the United States. But the doctrine laid down has never,

so far as I have been able to ascertain, been so limited. The language is certainly broad enough to cover a case of this kind. Note particularly this language of the Chief Justice in the Booth case: "*But, after the return is made, and the state judge or court, judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.*" There is no question that the appellant, Charles Ponzi, is in the custody under the authority of the United States under the mittimus issued out of the District Court of the United States for the District of Massachusetts November 30, 1920.

The writ issued out of the state court is *pro tanto*, at least, a habeas *ad subjiciendum*, for it takes a federal prisoner, and a federal agent, out of the federal prison, brings them into the state court, and holds them there under the pains and penalties of contempt, and imprisonment of the federal agent, for an indefinite period.

The practice suggested in the case of *Ableman* v. *Booth* was followed in a recent case of *Com.* v. *Horwitz*, No. 727, 1915, Suffolk Superior Court, Criminal Session.

In December, 1914, while one Morris Horwitz was a prisoner in the East Cambridge jail, under the custody of the United States Marshal for this District, awaiting action of the federal Grand Jury upon a charge of perjury, a writ of habeas corpus, dated December 19th and returnable December 21st, was issued by the Superior Court for Suffolk County to the Marshal ordering him to produce the prisoner for trial here, upon a complaint charging him with a violation of R.L. c.

165, sec. 45. The writ was presented to the Marshal, who, through the deputy, made to the Chief Justice of said Superior Court the following return:

"DECEMBER 19, 1914.

"Pursuant hereto I have the honor to make the return that the body of the within-named Morris Horwitz is now in my lawful custody as United States Marshal for the District of Massachusetts under the Constitution and laws of the United States, and respectfully invite the Honorable Court's attention to the decision of the Supreme Court of the United States in the case of *Ableman* v. *Booth*, 62 U.S. p. 506."

There was argument before the Chief Justice in which the District Attorney for Suffolk County, or one of his assistants, urged that the mandate of the writ should be enforced. The return was, however, accepted by the Chief Justice as sufficient, and the writ was never served.

X.

UPON THE PRINCIPLES OF NATURAL JUSTICE, THE STATE COURT SHOULD NOT BE PERMITTED TO TRY PONZI UNDER THE CIRCUMSTANCES, BECAUSE HE WOULD BE SUBJECT TO DOUBLE PUNISHMENT FOR THE SAME ACTS.

While technically there is no legal objection to trying a man for the same criminal acts by both the state courts and the United States courts, if the acts are punishable by both jurisdictions; yet it has been the invariable practice that, where a man is punished by one court, the other court will go no further.

In *Com.* v. *Fuller*, 8 Met. 316, there was a prosecution and conviction for having in his possession counterfeit coin, with intent to pass the same. Objection was made to the jurisdiction of the court by the prisoner, on the ground that the offense was one indictable and cognizable only in the courts of the United States, and he was liable to be indicted and tried in the courts of the United States. The Supreme Court of Massachusetts said:

> "It is contended also, that it is unconstitutional to subject a person to the operation of two distinct laws upon the same subject, and inflicting different pains and penalties. But I hold that the delinquent cannot be tried and punished twice for the same offence, and that the supposed repugnancy between the several laws does not, in fact, injuriously affect any individual. The man who commits the crime runs the hazard, under which jurisdiction he may be subjected to punishment; and after violating the law, it comes with ill grace from him to complain of the penalty. If he were indeed liable to be punished twice for the same offence, he might well argue against oppression; and the existence of such liability would go far to prove the unconstitutionality of the law. But while the proviso in the act of congress remains unrepealed, the criminal cannot be thus exposed; as the court which first exercises jurisdiction has the right to enforce it by trial and judgment, by the well established principles of law relating to the jurisdiction of courts. See 5 Wheat. 1 [*Houston* v. *Moore*]."

The argument in favor of this proposition is best set forth by Mr. Justice McLean in *Moore* v. *The People of the State of Illinois*, 14 How. at 21, a dissenting opinion:

> "It is contrary to the nature and genius of our government, to punish an individual twice for the same offense. Where the jurisdiction is clearly vested in the federal government, and an adequate punishment has been provided by it for an offense, no state, it appears to me, can punish the same act. . . .
>
> "It is true, the criminal laws of the federal and state governments emanate from different sovereignties, but they operate upon the same people, and should have the same end in view. In this respect, the federal government, though sovereign within the limitation of its powers, may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offenses under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.
>
> "It seems to me it would be as unsatisfactory to an individual as it would be illegal, to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the state laws, as under the laws of the federal government. It is true he lives under the aegis of both laws; and though he might yield to the

power, he would not be satisfied with the logic or justice of the argument."

XI.

QUERY: IS IT THE "DUE PROCESS OF LAW" TO WHICH THE PETITIONER IS ENTITLED UNDER SECTION 1 OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES TO BE SET TO TRIAL IN A STATE COURT WHILE SERVING SENTENCE AS A FEDERAL PRISONER?

Due process of law is a legal conception difficult to express. Due process is the current process. Whatever procedure the states may establish with regard to criminal trials seems to be due process.

This court said, in *Twining* v. *New Jersey*, 211 U.S. 103:

> "This court has never attempted to define with precision the words 'due process of law'. . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the union may disregard."

In *Frank* v. *Mangum*, 237 U.S. 348, Mr. Justice Holmes in the dissenting opinion said:

> "If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And notwithstanding the principle of comity and convenience (for, in our opinion, it is nothing more, *U. S.* v. *Sing Tuck*, 194 U.S. 161, 168, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621) that calls for a resort to the local appellate tribunal before coming to the

courts of the United States for a writ of habeas corpus, when, as here, that resort has been had in vain, the power to secure fundamental rights that had existed at every stage becomes a duty, and must be put forth."

Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction.

Pennoyer v. *Neff*, 95 U.S. 714, 733.
Scott v. *McNeal*, 154 U.S. 34.
Old Wayne Life Ins. Association v. *McDonough*, 204 U.S. 8.

This court said, in *Scott* v. *McNeal:*

"The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities [citing numerous authorities]. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

The contention is that the court, being without custody of Ponzi's body, cannot try him in a criminal case.

The Constitution of Massachusetts, art. XXVI, provides:

"No magistrate or court of law shall demand

excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishment."

General Laws of Massachusetts, c. 276, sec. 42, provides:

> "If it appears that the crime has been committed . . . the court or justice shall . . . admit the prisoner to bail, if the crime is bailable, and sufficient bail is offered."

It will not be doubted that larceny is a bailable offense, all crimes being bailable except the crime of treason, Gen. Laws of Mass. c. 264, sec. 1. In this case Ponzi is set to trial in the state court upon a bailable offense, and is denied bail.

Certainly there can be no doubt that one of "the fundamental" rights is the right to "a fair and impartial trial." Under the circumstances of this case Ponzi could not receive a fair and impartial trial. His case is prejudged before he is set to trial. He is under sentence in the United States Court for the same acts for which he would be tried in the state court. He is brought into court; he is not arrested, or served with any process; a plea is entered for him; he is held without bail, tried by a court without jurisdiction, and subjected to cumulative sentences, which may amount in fact to cruel and unusual punishment.

The Respondents' Case.

The precise question raised here has never been passed upon by the Supreme Court of the United States. An attempt was made to raise the question in

the case of *Ex parte Lamar* by a petitioner for certiorari to this court, which was denied, 250 U.S. 673.

Lamar was tried and convicted, and sentenced in the United States District Court for the Southern District of New York to two years in the United States penitentiary at Atlanta for impersonating an officer of the United States. Before being sentenced to Atlanta he committed another crime in that district, and was indicted with others for conspiracy in restraint of foreign commerce. While serving sentence at Atlanta, he was brought to New York without removal proceedings having been instituted under R.S. 1014, by direction of the Attorney General of the United States, and as soon as he arrived in New York he was brought before the District Court by writ of habeas corpus for trial, which resulted in his conviction, and was sentenced to one year in prison. He protested against the second trial, on the ground that he had a right to serve out his first term of imprisonment without interruption; and alleged also that he was forcibly removed from prison and taken to New York. Lamar later brought a petition for the writ of habeas corpus before Circuit Judge Manton in the Second Circuit. The case is reported in 274 Fed. 160, raising among other things the question as to whether he could be tried for the second offense while serving sentence for the first. The writ was denied upon the authority of the kidnapping cases, so-called:

Mahon v. *Justice*, 127 U.S. 700;
Kerr v. *Illinois*, 119 U.S. 436;
Pettibone v. *Nichols*, 203 U.S. 192.

These cases rest upon the doctrine as stated in *In re Johnson*, 167 U.S. 120, to wit:

> "That the law will not permit a person to be kidnapped or decoyed without the jurisdiction for the purpose of being compelled to answer to a mere private claim. But in a criminal case, the interests of the public override that which is after all a mere privilege from arrest."

The Lamar case may be distinguished from the case at bar, first, on the ground that there was a question of jurisdiction between two courts of the United States, not a question between the jurisdiction of a state court and a United States court; second, the United States court which tried Lamar for the second offense had custody of the person, although the court got jurisdiction by an unwarranted act of the Attorney General's, and practically by kidnapping the prisoner. Had Lamar been given an opportunity to bring a petition for the writ of habeas corpus in the United States District Court at Atlanta before he was kidnapped, there is little doubt that, on the authority of *In re Johnson*, his removal to New York for a second trial would not have been permitted.

Whatever authority the Attorney General may have over prisoners serving sentences in federal prisons under Comp. Sts. sec. 10,555, Act of March 3, 1891, c. 524, sec. 4, he has no such control over federal prisoners serving sentences in a state jail, as they are under the exclusive authority of the Keeper of the jail, or Master of the House of Correction, or Warden.

The only way by which the Ponzi case could be brought within the Lamar case, the Kerr case, the

Pettibone case, and the Mahon case would be to have the respondent Fessenden send the court officers down to the House of Correction at Plymouth, and forcibly take Ponzi and bring him up before the state court and proceed to try him. If he could be kept there long enough to finish his trial and be sentenced before the United States Marshal and his forces could retake the prisoner, probably the court could try Ponzi and render a valid judgment and sentence in his case.

The class of cases relied upon by the respondents is where the prisoner, while serving a sentence in a state penitentiary, commits some crime, generally homicide. He may be tried and executed notwithstanding his sentence. These cases, of course, are not in point, for the reason that the prisoner is at all times within the same jurisdiction, and, whether in prison or out of prison, he is subject to the criminal laws of the jurisdiction.

The principal case relied upon by the respondent is that of *Rigor* v. *State*, 101 Md. 465. In this case the plaintiff was convicted of a felony by the Circuit Court of Baltimore County in the State of Maryland, for which he was sentenced to be confined in state's prison for five years, and was committed to the custody of the Warden. Before receiving this sentence it appears that he had been indicted by a Grand Jury for Baltimore City for assault with intent to kill and murder. After his sentence he was brought in for trial by writ of habeas corpus before the criminal court of Baltimore City. He objected to his trial on the ground that he was then serving a sentence, and moved to quash the writ of habeas corpus. The motion was overruled, he was tried and adjudged guilty, and sentenced to

serve for a term of nine years, to begin at the expiration of the five years which he was already serving. The court held that, after final judgment and conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it, and cites *Mahon* v. *Justice*.

The Supreme Court of Maryland came to exactly the opposite conclusion in the case of *State* v. *Boyle*, 25 Md. 509, in which it appeared that one Boyle was indicted in Anne Arundel County for murder and larceny. The charge of murder was transferred to Howard County for trial. Upon the other indictment he was tried in Anne Arundel County, convicted, and sentenced to the penitentiary. After he had begun service of his sentence, the Circuit Court for Howard County issued a writ of habeas corpus to bring the prisoner from the penitentiary to try him for murder. He was produced by the Warden, who showed a copy of the judgment by virtue of which he held the prisoner in custody. The State Attorney moved that the custody of Boyle be transferred and he be handed over to the Sheriff of Howard County in order that he might be tried for the indictment of murder. Boyle's counsel moved to quash the writ of habeas corpus. The court overruled the State's motion, sustained that of the prisoner, and remanded Boyle to the custody of the Warden. The Supreme Court held that no writ of error would lie to a judgment of the Circuit Court upon a petition for the writ of habeas corpus. The reasoning in the Rigor case does not apply to this case, and should have little force or effect, since the prisoner has been punished once for the acts complained of.

What a state court may do with a state prisoner is one question; what a state court may do with a federal prisoner is quite a different question.

The Blake decision, by Morton, J., in the United State District Court (decision not published), does not help us. Ponzi was not a party, and the points and authorities raised in his behalf before this court, and in the Circuit Court of Appeals, were not brought to the attention of Judge Morton. The decision there turned largely upon the assumed authority of the Attorney General. The court there said:

> "Whether against objection made on behalf of the United State the State Court could have issued it, it is not necessary to decide."

In re Andrew, 236 Fed. 300, is another case relied upon by the respondents. This was a case where an alien, who was ordered deported, was also wanted as a witness in the state court. Upon an order of the department she was turned over to the local authorities, and was ordered held under bond of $300, which she could not give. She then brought a petition for the writ on the ground she was entitled to be deported. It would be observed at a glance that that is not the case at bar. The court said in that case: "Either may surrender its custody of a prisoner to the other without the prisoner's consent." That is not this case. Custody has not been surrendered. It is not law as well.

XII.

THE PRINCIPLE CONTENDED FOR BY THE RESPONDENTS IS A DANGEROUS ONE, IN THAT IT WILL LEAD TO CONFUSION, FREQUENT CLASHES, AND CONFLICTS OF JURISDICTION, WHERE NOW NONE EXISTS.

If the Attorney General may turn over a federal prisoner serving sentence in the House of Correction at Plymouth in the State of Massachusetts to a Massachusetts state court for trial, why may he not turn the same prisoner over to a state court in Rhode Island for trial, or a federal court in New York for trial? And if the prisoner were wanted in a dozen different states, he could turn him over to one after the other for trial. Such procedure would violate all laws with regard to extradition and removals.

XIII.

The practice has always been, if a federal prisoner is serving time in one jurisdiction and he is wanted in another, the jurisdiction which wants him lodges with the Keeper of the prison a warrant, and, when the prisoner is discharged at the end of his sentence, or by pardon or other operation of the law, the jurisdiction which wants the prisoner is notified, the prisoner is held, and removal proceedings are instituted. The same thing is true when a federal prisoner is wanted by a state court. The state court lodges its warrant with the Keeper of the prison where the federal prisoner is confined, and is notified when the prisoner's time is up, and upon the prisoner's release he is rearrested upon the state warrant, if he is within the jurisdiction of the state wanting him.

The usual practice in the state court is to allow a prisoner to serve one sentence, and, if he is wanted by another court in the same jurisdiction, he is rearrested upon the expiration of his sentence and taken before the court having jurisdiction of the crime for which he is wanted, and then and there tried.

One thing at a time is a very good rule. It is the rule of law and of order. Anything else is a rule of confusion and chaos, of conflict and strife. The argument of convenience and necessity, that justice may be defeated by delays, is absolutely without force in a case where a prisoner has been punished once for the same crime for which he is wanted; and, besides, you can do but so much to human life, you can take the whole of it, or you can cut it up in segments by taking away the liberty of the individual for a given period. The object of the law is not revenge, but punishment as a protection to society, and as a means of reform of the individual.

SUMMARY.

The Attorney General of the United States has no power or authority, directly or as representing the Executive, to interfere with the sentence of a federal court in a criminal case—either to lend or to hand over a federal prisoner to a state court for trial.

Considerations of comity do not require the United States to turn over a federal prisoner to a state court for trial, while its own laws do not permit it to take from a state jail or penitentiary a state prisoner for trial in its own courts.

Trial in a state court that is without jurisdiction of the person of the prisoner, where the prisoner is held

without bail upon a simple charge of larceny, is not "due process of law."

Ponzi, as a federal prisoner, is "in the law" of the United States, and cannot be surrendered to another jurisdiction until its justice is satisfied.

Respectfully submitted,

WILLIAM H. LEWIS.